(11)

IN THE

Supreme Court of the United States

October Term, 1941

No. 985

OWENS-ILLINOIS GLASS COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Owens-Illinois Glass Company, prays that a writ of *certiorari* be issued to review the decree of the United States Circuit Court of Appeals for the Sixth Circuit entered on December 2, 1941, directing the enforcement of an order of the National Labor Relations Board and denying the petitioner's petition for review.

Opinions Below

The opinion of the Circuit Court of Appeals filed December 2, 1941, is in the record (R. 1544-1573) and is re-

ported in *123 F. (2d) 670.* The Decision and Order of the Board (R. 106-187) are reported in 25 N. L. R. B. No. 17.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 347), and under Section 10(e) and (f) of the National Labor Relations Act (29 U. S. C. A. 160(e) and (f)).

Summary Statement of the Matter Involved

On July 5, 1940, the Board entered its Order (R. 185-187) requiring the petitioner:

1. To cease and desist from (a) discouraging membership in the Federation of Flat Glass Workers of America, or any other labor organization, of its employees by discriminating in regard to their hire and tenure of employment or any terms or conditions of employment and (b) in any other manner interfering with, restraining, or coercing its employees in their right to self-organization and other rights guaranteed in Section 7 of the Act;

2. To reinstate four employees and to make whole those four employees and also seven other employees for any loss of pay they may have suffered by reason of discrimination in regard to their hire and tenure of employment, less their respective net earnings and "deducting, however, from the amount otherwise due to each of said employees, monies received by said employees during said period for work performed upon federal, state, county, municipal, or other work relief projects, and pay over the amount, so deducted, to the

appropriate fiscal agency of the federal, state, county, municipal, or other government or governments which supplied the funds for said work relief projects";

3. To post appropriate notices in its plant at Fairmont, West Virginia; and

4. To notify the regional director of steps to be taken to comply with the Order.

The petitioner is an Ohio corporation engaged in the manufacture and sale of glass containers. It has plants in Indiana, Illinois, New Jersey, Ohio, Pennsylvania, and West Virginia. (R. 1446-7) The petitioner's business at its factory at Fairmont, West Virginia, is seasonal (R. 115), as its productive effort is largely devoted to the manufacture of beverage bottles for the soft drink industry. (R. 1047, 1448)

For many years prior to July, 1937, the mold makers and mold repairmen in petitioner's Fairmont plant were members of the American Flint Glass Workers' Union, an affiliate of the American Federation of Labor. (R. 269-270) The Glass Bottle Blowers' Association, also an affiliate of the American Federation of Labor, has jurisdiction over all of the skilled employees, including the operators of the bottle machines, and over many of the semiskilled and approximately 30% of the miscellaneous people. (R. 270-5) The evidence shows, without contradiction, that many years before the origin of this controversy the petitioner had entered into employees' agreements with these unions and that all of the officials of the petitioner, including its plant managers, had been fair in their dealings with these organized employees. (R. 276-7, 1547-8)

The seasonal character of the petitioner's operation at the Fairmont plant ordinarily necessitated the hiring of many people each spring and the laying off of many people

in the fall. (R. 115) The winter of 1936-1937, however, was an exception, as business was so good that the factory ran through the winter with little reduction in force. (R. 1506-7) Business increased with the boom of 1937 (R. 1049-50, 1511) to a record high, only to drop suddenly and precipitously in the early fall of 1937. (R. 115, 1507) The entire glass industry suffered a slump of near panic proportions at that time. (R. 39, 1054-5)

Just before the 1937 slump, or near panic, hit the Fairmont plant, the formation of a new labor union had been started. Its organization meeting was held July 6, 1937 (R. 264), and it received an American Federation of Labor charter on July 31, 1937. (R. 266-7, 1452-3) This charter was subsequently revoked and a new C. I. O. charter received, the union being known as "Local 55". (R. 268) The organizational drive for Local 55 was carried on simultaneously with the collapse of petitioner's business so that among the hundreds of people who were necessarily laid off in the fall of 1937 (R. 1507), there were many, including those who filed complaints with the Board, who had recently signed applications for membership in Local 55.

In March, 1937, there were 1537 persons employed in the petitioner's plant. By September, 1938, it had become necessary to lay off over half of those employees so that there were ultimately only 737 employees who continued on the payrolls. (R. 1507-8) Out of the 800 employees who thus had to be laid off in eighteen months, thirty-eight complainants claimed they had been laid off because of union activity. After many months of extended hearings,[1] the

(1) The original complaint filed by the Board on February 5, 1938 (R. 1), charged the petitioner with discriminating as to thirty-eight employees. Trial Examiner John T. Lindsay found that the petitioner had discriminated with respect to its treatment of every one of the thirty-eight named employees. (R. 13) Upon exceptions filed by the petitioner with the Board, the entire record with the exception of the formal pleadings was ordered set aside because of numerous prejudicial rulings of the Trial Examiner. (R. 13) On May 27, 1939, the Board issued an amended com-

Board finally held that eleven men and women—out of 800 employees laid off—had been discriminated against in regard to their hire and tenure of employment. It was in respect to this finding of the Board as well as to its finding that the petitioner was guilty of unfair labor practices within the meaning of Section 8(1) of the Act that the petitioner filed its petition in the Circuit Court of Appeals of the Sixth Circuit.

The Circuit Court of Appeals denied the petition for review and directed the enforcement of the Board's Order, Circuit Judge Hamilton dissenting. The only opinion rendered in the case (R. 1544) was that of Judge Hamilton who, after very carefully analyzing the testimony before the Board, concluded that the Board had failed to affirmatively establish a violation of either Section 8(1) or Section 8(3) of the Act. Judge Hamilton stated he was of the opinion that the decisions upon which his colleagues relied were not binding because the issues and facts in the case at bar are substantially dissimilar, but that since his colleagues did not agree, the petition for review must be denied. It is to review that decree that the petitioner is seeking a writ of *certiorari*.

Questions Presented

1. If the petitioner should be required to make whole any of the complainants for any loss of pay they may have suffered, shall the petitioner deduct from the respective

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plaint (R. 14) which omitted ten of the original complainants as to whom Examiner Lindsay had found the petitioner guilty and which added two new complainants. Hearing on the amended complaint was had before Trial Examiner W. R. Ringer in the summer of 1939; and his Intermediate Report (R. 33), dated December 18, 1939, found the petitioner had not discriminated in regard to the hire and tenure of the employment of twelve of those employees and had discriminated in respect to eighteen of the employees. Upon the petitioner's exceptions, the Board, in its Order of July 5, 1940, reversed the Trial Examiner as to seven of those eighteen complainants and sustained the Trial Examiner as to his findings of discrimination in respect to the remaining eleven. (R. 106)

amounts, which otherwise would be due each of said employees, monies received by said employees for work performed upon federal, state, county, municipal, or other work-relief projects, and pay over the respective amounts, so deducted, to the appropriate fiscal agency of the federal, state, county, municipal, or other government or governments which supplied the funds for said work-relief projects, as directed by Section 2(b) of the Board's Order issued in this case on July 5, 1940?

2. Should the petitioner be required to cease and desist from "discriminating in regard to * * * any terms or conditions of employment and from interfering with, restraining, or coercing its employees in the exercise of their right * * * to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *" where collective bargaining was not an issue and where the evidence and the Board's findings are confined to charges of discrimination in regard to hire and tenure of employment and to charges that the petitioner interfered with, restrained and coerced employees in the exercise of their right to self-organization and to form, join or assist labor organizations?

3. In July, 1940, the Board ordered the employer to reinstate four employees whose employment the Board found had been discriminately terminated—as to three in 1937 and as to one in 1938. The record shows that the rehiring of these four employees was considered in March, 1939, by a new plant manager, who admittedly had nothing to do with the alleged wrongful terminations of their employment and whom the Board has not charged with any antiunion sentiment or activity. This new plant manager reviewed the records of these employees, including the facts developed by the testimony taken before the Trial Exam-

iner of the Board and, upon all the evidence, concluded that they could not thereafter be satisfactory employees. The plant manager stated reasons for refusing to rehire them which were sound and sufficient in the judgment of the management and which were not based upon union membership or activity. Can the Board order the *reinstatement* of these four employees as distinguished from ordering reimbursement up to the time of the decision of the new manager?

4. Is the Board's Decision and Order supported in all respects by substantial evidence? Was not the Sixth Circuit Court of Appeals in error in holding that the decisions of this court in *National Labor Relations Board vs. Pennsylvania Greyhound Lines*, 303 U. S. 261, 82 L. Ed. 831, 58 S. Ct. 571; *National Labor Relations Board vs. Falk Corporation*, 308 U. S. 453, 84 L. Ed. 396, 60 S. Ct. 307; *National Labor Relations Board vs. Link-Belt Co.*, 311 U. S. 584, 85 L. Ed. 368, 61 S. Ct. 358; *National Labor Relations Board vs. Waterman Steamship Corporation*, 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct. 493, required the affirmance of the Board's Order when in fact that Order was not supported in all respects by substantial evidence but only by mere suspicion?

Reasons for Granting the Petition

1. THE BACK PAY ORDER IS INVALID.

In Section 2(b) of its Order (R. 186), the Board ordered the petitioner to reimburse the eleven complainants for any loss of pay they may have suffered by reason of petitioner's discrimination in regard to their hire and tenure of employment by paying to each a sum of money equal to that which each would normally have earned in wages from the respective time of the discrimination to

the time of reinstatement or offer of reinstatement less their respective net earnings for said period. *In addition*, the Order directed the petitioner to deduct from such payments to the complainants the amounts they had received for work performed upon "federal, state, county, municipal or other work-relief projects" and to pay over such amounts to the appropriate governmental agencies which had supplied the funds for the work-relief projects. (R. 186)

Unquestionably the decision of the United States Circuit Court of Appeals, in sustaining the Board's Order which required the employer to pay to the appropriate governmental agencies such amounts as the complainants may have received from work-relief projects, is in conflict with the applicable decision of this court, namely, *Republic Steel Corporation vs. National Labor Relations Board*, 311 U. S. 7, 85 L. Ed. 6, 61 S. Ct. 77.

The making of this error by the Circuit Court of Appeals indicates the extent to which the reviewing courts have gone in failing to give careful consideration to appeals filed by employers from decisions of the National Labor Relations Board. The Circuit Courts of Appeals, or at least many of them including the Sixth Circuit, seem to have been so impressed by this court's direction not to substitute their opinions for the opinion of the Board that the records in cases such as this are not as carefully considered as in the ordinary case.

This error in reference to back pay was urged in the petitioner's petition for review of the Board's Order (R. 198), in the petitioner's brief, and in oral argument. Yet, with all of this, the Circuit Court of Appeals held that the Board's Order should be enforced. For this reason, if for no other, we submit the petitioner is entitled to have its case reviewed by this Court.

2. THE BOARD'S ORDER IS TOO BROAD IN ITS SCOPE.

Section 1(a) and (b) of the Board's Order reads as follows:

> "1. Cease and desist from:
>
> "(a) Discouraging membership in Federation of Flat Glass Workers of America, or any other labor organization of its employees, by discriminating in regard to their hire and tenure of employment *or any terms or conditions of employment;*
>
> "(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, *to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection,* as guaranteed in Section 7 of the National Labor Relations Act." (Italics ours)

This portion of the Board's Order is in direct conflict with the recent decision of this Court in *National Labor Relations Board vs. Express Publishing Co.*, 312 U. S. 426, 85 L. Ed. 930, 61 S. Ct. 693. This Court in that decision ordered stricken from the Board's Order there before it for review that portion which restrained the employer from committing acts which the Board "has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct." This Court said:

> "* * * We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found."

The Board seeks to do just that in the Order now before this Court. The portions of the Order which we have italicized are without support in the record and are not

based on any findings by the Board. There was no finding that the petitioner had discriminated in regard to "any terms or conditions of employment" as set forth in Section 1(a) of the Order. Neither were there any findings to support Section 1(b) of the Order, wherein the Board seeks to enjoin the petitioner from interfering with, restraining or coercing its employees in the exercise of their right "to bargain collectively" or "to engage in concerted activities for the purpose of collective bargaining". There is no question of collective bargaining involved in this case.

In Section 1(b) of the Order, we find that the Board has merely quoted verbatim Section 7 of the Act. It is this general "shotgun" practice which we understand this Court was condemning in the *Express Publishing Company* case when it said:

> "* * * To justify an order restraining other violations" (than those specifically based upon the Board's findings) "it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past."

In the instant case, the Board's findings are confined to charges of discrimination in regard to hire and tenure of employment and to charges that the petitioner interfered with, restrained and coerced employees in the exercise of their right to self-organization and to form, join or assist labor organizations. Clearly these findings bear no resemblance to interference with terms or conditions of employment or with interference with efforts to bargain collectively or to engage in concerted activities for the purpose of collective bargaining. Neither does the petitioner's course of conduct indicate any danger that any such violations will be committed by the petitioner in the future for it appears from the record without contradiction that the

petitioner bargained collectively with unions for many years prior to the formation of Local 55 (R. 269-275) and that all of the officials of the petitioner, including its plant manager, have been fair in their dealings with these organized employees. (R. 276, 1547-8) There is no evidence that either Local 55 as an organization or its members as individuals have ever asked the petitioner to bargain. There is nothing in this record to indicate that if such is done, the petitioner will not comply fully with the terms of the Act; in fact, the exact opposite is true.

It is therefore apparent that the Sixth Circuit Court of Appeals, in affirming the Board's Order in its entirety, did so in direct conflict with this Court's decision in the *Express Publishing Company* case. We respectfully submit that the petitioner should not be required to conduct its labor relations for the indefinite future at the peril of a summons for contempt for refusing to bargain collectively where collective bargaining is not at issue and where the Board has not found that the petitioner was guilty of such unlawful practice or that such violation by the petitioner is to be anticipated from the petitioner's course of conduct in the past.

3. THE BOARD'S ORDER REQUIRING THE REINSTATEMENT OF FOUR EMPLOYEES IS INVALID.

Section 2(a) of the Board's Order (R. 185-6) requires the petitioner to reinstate Lena Anselene, Edith Gallion, Nick Balseto, and Francis M. Daugherty to their former or substantially equivalent positions. All other complainants, as to whom the Board found there had been discrimination, had been reemployed or had been offered employment prior to the second hearing before the Board's Trial Examiner. (R. 183) The order of reinstatement as to these four com-

plainants raises issues separate and distinct from the alleged discriminatory layoffs; but the Circuit Court of Appeals failed to consider this distinction in affirming the Board's Order in its entirety. In so doing, that court has decided an important question of federal law which has not been, but should be, settled by this Court.

Miles Beishline became the plant manager at Fairmont in May, 1938 (R. 241), shortly after the first hearing before the Board and while this matter was still pending before the Board. (R. 12, 14) Beishline had nothing whatsoever to do with the alleged discriminatory treatment of the eleven complainants when they were laid off along with 800 other employees during the 1937-1938 panic in the glass container industry. In the spring of 1939, when improved business conditions made it appear that additional employees might be put to work, Beishline issued special instructions to the department heads concerning the rehiring of the complainants. (R. 1398) These instructions were that all the complainants were to be considered for rehiring on exactly the same basis as the other employees who had been laid off, and the fact that they were complainants was not to enter into the consideration in any way. The complainants were to be considered only on their merits. If any reasons appeared to exist why any of them was not to be rehired, Beishline ordered that the matter be discussed with him and the reasons for not rehiring presented to him. (R. 1398)

These instructions were followed (R. 1398); and after investigating each case as it came up, Beishline decided that all but the four complainants in question should be rehired. (R. 1394-1402) He discovered that Edith Gallion was not only very disinterested in her work and very irregular in her attendance, being absent without notice for six or seven days at a time (R. 1564), but that her moral

character was such that she was not a good influence on the girls with whom she worked. (R. 1402) Nick Balseto was found by Beishline to be so abusive to the girls that they could not do their work around him. (R. 1398-1400) Beishline testified (R. 1399): "If any other man in that factory today did the things Nick Balseto did, he would be discharged for it, and I think they all know that." Lena Anselene was discovered to have been the outstanding violator of the petitioner's no-talking rule on the lehrs and to be incapable of devoting her time to her job while at work. He found that Lena Anselene had not only lost interest in her own work but that she spent so much time talking that other employees were prevented from performing their work. (R. 1400-1) Francis M. Daugherty was found to have become so embittered and antagonistic to the petitioner and its supervisory employees that the employer-employee relationship could no longer be maintained. (R. 1394-8) These findings of Plant Manager Beishline stand undisputed in the record.

Beishline was not plant manager in the summer and fall of 1937 (R. 241) and had nothing to do with the alleged anti union activities which took place at that time. The suitability of the complainants, however, had been put in issue by the filing of the complaints. The ensuing investigations, in part conducted by the Board, and the hearings before the Board's Trial Examiners, exposed to this new plant manager, for the first time, serious faults which made these four complainants unsuitable as employees. Beishline considered each of the cases independently, and it was by reason of his decision that these four employees were not recalled. His sincerity, which was unquestioned by the Board, is best evidenced by the following excerpt taken from his testimony as to his investigation of complainant Nick Balseto (R. 1399):

> "A. I was not interested in Nick Balseto's union activity at all. We have got a lot of people in our factory who are interested and active in this union. It does not make a bit of difference to me, as long as they conduct themselves in the factory right, and do their work."

While the Act gives the Board the right to order the employer to take affirmative action, "including the reinstatement of employees," we submit that under the facts in this case, the Board's order of reinstatement was improper and the Sixth Circuit Court of Appeals should have so held. Months after the alleged discriminatory layoffs and at a time when other complainants were being rehired, the petitioner, acting through its plant manager and not through some foreman or supervisor, separately and fully considered the situation in regard to these four employees and concluded they should not be rehired—and the findings of Plant Manager Beishline are uncontradicted in the record. The order of reinstatement clearly denies to the petitioner the employer's normal right to hire and fire its employees which this Court guaranteed in *National Labor Relations Board vs. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, and in *Associated Press vs. National Labor Relations Board*, 301 U. S. 103, 81 L. Ed. 953, 57 S. Ct. 650.

If this decision is permitted to stand, it simply means that a prior discriminatory layoff or discharge insures the employee so treated a permanent job—and this is so, even though new management discovers facts which, without contradiction, establish that such employee is wholly unsuitable for further employment. We maintain that no such result as this was ever contemplated by the National Labor Relations Act.

4. THE ORDER OF THE BOARD IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The only opinion rendered by the Circuit Court of Appeals in this case was that of dissenting Judge Hamilton. After he had critically discussed the separate findings of the Board and the case of each of the complainants and had found a total lack of substantial evidence to support the Order and findings of the Board, he added the following paragraphs as comprising the decision of the majority (R. 1573):

> "My colleagues do not agree with the conclusions here announced and are of the opinion that the rules announced in *National Labor Relations Board vs. Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *National Labor Relations Board vs. Falk Corporation*, 308 U. S. 453, 461; *National Labor Relations Board vs. Link-Belt Company*, 311 U. S. 584, 597; *National Labor Relations Board vs. Waterman Steamship Corporation*, 309 U. S. 206, 209, require the enforcement of the Board's order.
>
> "I am of the opinion these decisions are not binding presently because the issues and facts in the case at bar are substantially dissimilar. Since my colleagues do not agree, it follows that a decree may be entered directing the enforcement of the Board's order and denying the petition for review."

This decision raises squarely the question as to whether or not the Circuit Courts of Appeals are foreclosed from considering the record in these Labor Board cases to determine whether substantial evidence has been presented by the Board in support of the complaints. Many of the Circuit Courts of Appeals, including the Sixth, appear to have interpreted the decisions of this Court referred to in the foregoing quotation, as a mandate from this Court, withdrawing all power from the Courts of Appeals to analyze

the findings of the Board for the purpose of determining whether or not they are supported by substantial evidence. This, in effect, destroys the right of review provided for by Sections 10(e) and (f) of the Act (29 U. S. C. A. 160(e) and (f), 49 Stat. 449), and is contrary to the decisions of this Court in *Consolidated Edison Co. vs. National Labor Relations Board,* 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206, and *National Labor Relations Board vs. Columbian Enameling and Stamping Co., Inc.,* 306 U. S. 292, 83 L. Ed. 660, 59 S. Ct. 501.

We are aware that this Court does not ordinarily grant *certiorari* to review judgments based solely on questions of fact; but it has done so in *National Labor Relations Board vs. Waterman Steamship Corporation,* 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct. 493, and very recently in the case of *National Labor Relations Board vs. Nevada Consolidated Copper Corporation,* No. 774 in this Court. In both of those instances, it was the Board which was contending that this Court should review the record. In the *Waterman Steamship* case, the Board charged that that case was one of a series of cases in which the courts below had failed to properly consider the conclusiveness of the Board's findings. We maintain that the case at bar is likewise one of a series—a series of the opposite character in which, we believe, the Circuit Courts of Appeals have improperly applied what this Court said in the *Waterman Steamship* case and other similar cases concerning the conclusiveness of the Board's findings. The Circuit Courts are not examining the records to ascertain the existence of substantial evidence. So long as there is anything which has the appearance of evidence to support any part of the Order of the Board, they are refusing to test the substantial character of that evidence and to determine whether each element of the Order is supported by substantial evidence.

We contend, just as earnestly as was contended by the Board in the *Waterman Steamship* case, that the Circuit Court of Appeals failed to act properly on the record before it in the instant case. In this record, there was no substantial evidence to support the findings in many, many respects; but the Sixth Circuit Court, like so many other Circuit Courts of Appeals, has treated the *Waterman Steamship* decision and other decisions of this Court as preventing them from examining the record. We humbly suggest that the time has come when this Court should admit a case for the purpose of determining whether there is substantial evidence to support the Board's Order. Up to date, the cases which have been admitted were only those where this Court had found that the Board's findings should be conclusive.

Judge Hamilton, who did examine the record in this case and who set forth the evidence in detail in the only opinion rendered in the case, concluded there was no substantial evidence to support the Board's findings and Order. The following quotation from his opinion (R. 1564-5) regarding the lack of substantial evidence to support Edith Gallion's complaint, should be sufficient in itself to demonstrate to this Court that the writ should be granted:

> "* * * She was not active in organization work, but Smouse, her foreman, knew she belonged to the union. The uncontradicted evidence shows that this complainant would absent herself without notice to her employer for six or seven days at a time and that Smouse had reprimanded her several times for this practice. Plant manager, Beishline, who succeeded Denelsbach, testified that Mrs. Gallion was very uninterested in her work, very irregular in her attendance, worked poorly with others and did not fit into the organization. The Board found she was frequently absent from her work, but without any evidence to support its conclusion stated 'there is no evidence that Gallion's absence from work on any of the days mentioned in Smouse's memorandum was

> without permission or against instructions.' Smouse testified to the contrary and his testimony was supported by Edith Donlin, who worked with complainant. Petitioner was justified in selecting Mrs. Gallion to be laid off and the Board's order as to her is without substantial evidence."

Edith Gallion is the employee who, when questioned as to her union activity, frankly admitted, "I was no leader." (R. 811) She obtained no members for the union and did not even pass out any application cards. (R. 804) When asked on direct examination the following question by the counsel for the Board, "Now after you signed up with the union and up until you were laid off in September, 1937, did you engage in any activity for the union?" Mrs. Gallion's unqualified answer was "No, sir." (R. 804) We submit that it is quite significant that the Board's finding in respect to this complainant was that she had been laid off "because of her membership in the union" (R. 138), whereas in respect to each of the other complainants, the Board found discrimination because of the employee's "union membership *and activity*".

Other than the fact that Edith Gallion was a member of the union, there is no evidence of any kind, substantial or otherwise, in this record to support the Board's conclusion of discrimination as to Edith Gallion. If ever there was an occasion where the Board's finding of discrimination was based on pure suspicion and nothing else, we submit that this is it. The Board simply refused to believe the uncontradicted evidence that Edith Gallion was included in the layoff list because of reduced operations, because of her nondependability, and because she was too frequently absent from work. (R. 1459, 1463, 1464)

It is unquestioned that Edith Gallion laid off on the following dates during the five months prior to her layoff on September 17, 1937 (R. 1463):

May 19, 23, 24, 25, 26;
June 13;
July 27, 30, 31;
August 1, 2, 3, 4, 5, 19, 20, 21, 22, 23, 24, 28;
September 5, 6, 8, 9, 10, 11, 12, 13, 14, 15.

In an attempt to avoid the effect of those absences, the Board probably makes the most outrageous statement of the many unsupported statements in its Decision and Order when it says (R. 137):

> "There is no evidence that Gallion's absence from work on any of the days mentioned in Smouse's memorandum was without permission or against instructions."

It is difficult to believe that an unprejudiced tribunal, administrative or otherwise, would make such a statement, particularly in light of the uncontradicted testimony of Edith Donlin who testified she heard Edith Gallion's boss ask her on a number of occasions why she did not come to work and why she was not more interested in her job than riding around in her car. (R. 1366) Miss Donlin further testified that she knew Edith Gallion frequently stayed away without permission because "I would hear them telling her about it when she came to work the next day." (R. 1366) Mrs. Gallion herself demonstrated her desire for time off by admitting that it was her custom to take a vacation "about every two years". (R. 812)

Thus the record proves beyond the shadow of a doubt, and without contradiction, that Edith Gallion was off from work for extended periods on frequent occasions and that she had been advised that the petitioner disapproved of her practice. Even if all the Board's evidence be credited, the most that it shows is that the petitioner knew of Edith Gallion's union membership. There is nothing more than suspicion that this may have been the reason for her lay-

off. It is no more than common sense that an employer faced with the problem of drastically reducing his staff because of economic conditions would include first in a list of persons to be furloughed an employee who had so frequently disobeyed the company's rules in failing to report for duty without prior notification or permission and who had appeared for work less than 50% of the eligible working days during the month and a half just prior to the lay-off period.

There is no better example of the general unsubstantial character of the evidence relied upon by the Board to support its findings than the evidence upon which the Board based its finding that the complainant James Shaffer was discharged because of union membership and activity. Shaffer operated a small gasoline tractor used to haul glass containers in the Decorating Department where great care had to be exercised because of the congested condition. (R. 1184-5) After Shaffer had ignored numerous warnings by his superiors, he was discharged for gross negligence and recklessness, all of which he failed to deny. As to his case, Judge Hamilton said (R. 1573):

> "* * * There is no substantial contradiction of the testimony of numerous witnesses that Shaffer was guilty of the grossest negligence in the operation of the tractor. The Board, in its decision, recites most of the foregoing testimony, but disregards all of it and bases its decision that the complainant was discriminated against on the sole ground that petitioner knew of his union activity and membership and therefore he must have been discharged for that reason. The evidence overwhelmingly shows complainant was habitually negligent in the discharge of his duties, and under such circumstances petitioner was justified in dispensing with his services, and the fact of his union membership and activity is immaterial."

What has just been said in respect of the lack of substantial evidence to support the Board's findings concerning Edith Gallion and James Shaffer, could be said with equal application to the other complainants and to the Board's general findings in reference to interference and coercion. However, in view of the very detailed review and analysis of the testimony in Judge Hamilton's opinion, we do not deem it necessary or proper at this time to discuss the evidence in the entire record. A reading of Judge Hamilton's opinion (R. 1544-1574) will demonstrate that the Sixth Circuit Court in this case has, as have other Circuit Courts of Appeals in many other cases, misconstrued or misapplied what this Court has said in regard to the conclusive character of the findings of the Board; and this we submit raises a question of great public importance concerning the enforcement of the National Labor Relations Act.

CONCLUSION

The decision of the court below in reference to the back pay order is in direct conflict with the decision of this Court in *Republic Steel Corp. vs. National Labor Relations Board*, 311 U. S. 7, 85 L. Ed. 6, 61 S. Ct. 77; and the Order of the Board as affirmed by the court below is too broad in scope under the decision of this Court in *National Labor Relations Board vs. Express Publishing Co.*, 312 U. S. 426, 85 L. Ed. 930, 61 S. Ct. 693. Furthermore, the Court's decision requiring the reinstatement of four employees raises an important question of federal law which has not been, but should be, settled by this Court. Finally, the Board's findings and Order are in many respects not based on substantial evidence but only on mere suspicion, as so clearly appears from Judge Hamilton's opinion in the court below. For these reasons, we submit that this petition for

a writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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